INDEX

Page

REPLY BRIEF OF PETITIONER S. GEORGE BURRIS TO BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI CONCERNING EVIDENCE OBTAINED BY "TRESPASS", "OFFICIAL IMPROPRIETY" AND "UNLAWFUL SEARCH AND SEIZURE" 1

I. Reply To Argument (Br., pp. 64-74) 2

A. Disclosures by the Solicitor General 2

B. Suggested Conclusions of the Solicitor General, and Answer Thereto 3

CONCLUSION 6

TABLE OF CASES

Black v. *U.S.*, 385 U.S. 26; 87 S. Ct. 190, 17 L. Ed. 2d 26 ..... 2, 5, 8

O'Brien v. *U.S.*, — U.S. —, 18 L. Ed. 2d 94 ..... 5, 8

Offutt v. *U.S.*, 348 U.S. 11, 14; 75 S. Ct. 11, 99 L. Ed. 11 6

People v. *Cahan*, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911, 50 A.L.R. 2d 513 (1955) 6

Schipani v. *U.S.*, 385 U.S. 372, 87 S. Ct. 293, 501, 533 .. 2

State v. *Cory*, 382 P. 2d 1019 (1963) 6

MISCELLANEOUS

Fourth Amendment to the Constitution 5

Fifth Amendment to the Constitution 5

Sixth Amendment to the Constitution 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1003

S. GEORGE BURRIS, ET AL., *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

REPLY BRIEF OF PETITIONER S. GEORGE BURRIS TO BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI CONCERNING EVIDENCE OBTAINED BY "TRESPASS", "OFFICIAL IMPROPRIETY" AND "UNLAWFUL SEARCH AND SEIZURE"

This Reply Brief is submitted by Petitioner, S. George Burris, in response to that portion of the Brief of the United States (Br. pp. 64-74) in opposition to the Petition for Writ of Certiorari filed in this case by all petitioners because of the admissions which relate to Petitioner Burris, coupled with the concession of the Solicitor General (Br. p. 73), that "in all the circumstances" he does not "oppose a remand of Petitioner Burris' case".

Petitioner S. George Burris prays, in view of the extraordinary admissions in the Brief filed by the

Solicitor General (Br. pp. 64-74), that this Reply be accepted by the Court in its consideration of this case.

Petitioner Burris, in filing this Reply Brief, does not waive any of the matters, things and arguments in the Reply Brief filed by all petitioners.

I

REPLY TO ARGUMENT (Br. pp. 64-74)

A. Disclosures by the Solicitor General

The Solicitor General admits, pursuant to the policy set forth in the Supplemental Memoranda filed in *Schipani* v. *United States,* 385 U.S. 372, 87 S. Ct. 293, 501, 533, that a review was conducted to determine whether electronic eavesdropping or wiretapping affected the convictions of any of the petitioners in this case. The Solicitor General admits (Br. p. 64) with respect to Petitioner Burris, it was found, "pursuant to Departmental authorization described at pp. 2-3 of the Supplemental Memorandum for the United States in *Black* v. *United States,* 385 U.S. 26, 87 S. Ct. 190, 17 L. Ed. 2d 26, the Federal Bureau of Investigation on or about January 21, 1963, installed a microphone by trespass in the office of Benjamin Sigelbaum in Miami, Florida", and that this illegal surveillance continued until July 12, 1965. On December 2, 1963 (approximately six months after the return of the indictment in Petitioner Burris' case), the Solicitor General admits Burris engaged in a conversation in Sigelbaum's office which was overheard and a "verbatim transcript of that conversation appears in the FBI logs" (Br. p. 64).

The Solicitor General attempts to summarize this monitored conversation (Br. pp. 64-65), but admits Petitioner Burris discussed his personal financial

problems relative to his interests in Sun Valley, Inc., with Sigelbaum. The Solicitor General admits that Sigelbaum discussed a prior claim he had against Burris' interest in Sun Valley and a loan Burris made from one Kipnis (a witness who testified for the Government in the trial in the District Court relating to these and other transactions with Burris). The Solicitor General admits Burris related he had paid for his interest in Sun Valley by borrowing $57,000.00 from Kipnis which he later repaid by a fee given him by Kipnis for obtaining a loan from the Pension Fund (a transaction included in the indictment). The Solicitor General admits Sigelbaum named an individual who had difficulty in obtaining a Pension Fund loan and suggested that this party might be a good defense witness. The Solicitor General admits Sigelbaum and Burris discussed the situation of a co-petitioner Hyman and his position relative to money which he had borrowed from the Pension Fund.

The Solicitor General concedes the conversations were summarized and sent to "some of the Government attorneys who prosecuted the case" against Petitioner Burris, and reluctantly admits that illegally obtained information was "relevant" to the "facts of the case" (Br. p. 65). We know of no rule of admissible evidence based upon "peripheral" arguments. Evidence is either relevant or irrelevant.

B. Suggested Conclusions of the Solicitor General and Answer Thereto

The Solicitor General, in his apologia (Br. p. 65), attempts to minimize the effect of this illegal eavesdropping by gratuitously informing the Court that any information contained in the report furnished the prosecuting Government attorneys "relevant" to the

facts in the Burris case was already known by them from other sources, and was never used for any investigative leads by the Government attorneys, the Federal Bureau of Investigation, or any other Governmental agency. The Solicitor General volunteers (outside of the record in this case) that Petitioner Burris had made statements regarding the Kipnis loan to Special Agents of the Internal Revenue Service and Kipnis had testified in detail about these transactions before a Grand Jury (Br. p. 65).

Gratuitously, the Solicitor General concludes (Br. p. 69), that the transactions discussed by Petitioner Burris were "peripheral" to the main body of evidence presented at trial. This is belied by the Government's own Brief in Opposition, in which references to Burris and Sun Valley, Burris and Kipnis, the Kipnis-Causeway Inn transaction, and Burris and Hyman, are treated abortively in a review of the Government's evidence:

Sun Valley (Br., pp. 6-9);

Burris-Kipnis (Br., p. 24);

Burris-Kipnis-Causeway Inn transaction (Br., p. 29);

Burris- Kipnis $57,000.00 check (Br. p. 33);

Burris-Hyman (Br., p. 17);

Burris-Hyman-Sun Valley (Br., p. 19);

Burris-Kipnis-Kovens Good Samaritan Hospital (Br., p. 27).

Both the majority and dissenting opinions below agreed that the common object or design of the claimed scheme and conspiracy was to obtain money for the

purpose of relieving the financial distress of Sun Valley for Hoffa's benefit (Petition for Certiorari, App. A, pp. 11-a; 12-a; 47-a).

The Solicitor General attempts (Br. pp. 70-73) to distinguish this case (and impose his judgment on this Court) from *Black* v. *U. S., supra,* and *O'Brien* v. *U. S.,* U.S. , 18 L. Ed. 2d 94, on the untenable grounds that, although concededly there has been a violation of the Fourth Amendment, since such violation does not infringe upon the privacy of attorney-client conferences, and since Petitioner Burris was indicted with a number of other petitioners and a long trial ensued, the remedy be either to (Br., p. 73): (1) deny his petition without prejudice to the filing of appropriate motions in the District Court; or (2) grant the Petition and remand the case to the District Court for a hearing on the question of whether tainted evidence was used against him. Although the Solicitor General attempts to distinguish *Black* and *O'Brien* it is significant that the remedies suggested here are, in effect, those he sought in the cases cited. In *Black* and *O'Brien,* this Court rejected the Solicitor General's suggested remedies, and granted new trials to insure the accused fair trials.

We submit that the Solicitor General's requests do not protect Petitioner Burris under the Fourth, Fifth, or Sixth Amendments of the Constitution in his right to a fair trial, nor are they consistent with the decisions of this Court in *Black* and *O'Brien,* where similar concessions of illegal and improper eavesdropping by the Government had been made. Certainly the Solicitor General's requests do not meet the further requirement of this Court, that where trials involve the "subtle ingredients of what constitutes justice", such trials must

"satisfy the appearance of justice", as decided by this Court in *Offutt v. U. S.*, 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11.

CONCLUSION

The clear and admitted violations of Petitioner Burris' constitutional rights require that this Court, instead of adopting the suggestions of the Solicitor General in regard to a remand, direct that the Judgment and Sentence of Petitioner Burris below be set aside, and the charges as to him be dismissed.

In urging this action, we quote the Supreme Court of Washington's *En Banc* unanimous decision in *State v. Cory*, 382 P. 2d 1019 (1963), following *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911, 50 A.L.R. 2d 513 (1956). *Cory* and *Cahan* both involved similar situations concerning the obtaining of "evidence" through "eavesdropping" by the States. In *Cory*, in reversing a conviction and in disposing of the argument that a new trial only should be ordered, and that in the second trial, it should be necessary for the accused to show prejudice again "in order to secure dismissal", the Supreme Court of Washington held:

"... In effect, the court in that case said that it was not necessary for the defendant to show that he had been prejudiced in the first trial, in order to secure a second trial, but that it would be necessary to show that he would also be prejudiced in a second trial, in order to secure a dismissal.

"We do not appreciate the logic of this conclusion. There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which

aided it in the preparation of its case, that information would be as available in the second trial as in the first. * * * And if the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that *they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence* and knowledge of the defendant's trial strategy.

* * * * *

"'* * * Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such "dirty business." See McNabb v. United States, 318 U.S. 332, 345, 63 S. Ct. 608, 87 L. Ed. 819. Courts refuse their aid in civil cases to prevent the consummation of illegal schemes of private litigants. Lee On v. Long, 37 Cal. 2d 499, 502-503, 234 P. 2d 9, and cases cited; *a fortiori*, they should not extend that aid and thereby permit the consummation of illegal schemes of the state itself. See Roberts, J., concurring in Sorells v. United States, 287 U.S. 435, 453, 53 S. Ct. 210, 77 L. Ed. 413 [86 A.L.R. 249]. It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law.'

"This concept of how the judiciary should react to violation of constitutional rights, appeals to us.

* * * * *

". . . The judgment and sentence must be set aside and the charges dismissed."

[Emphasis supplied]

At the very least, we urge that this Court follow the precedent which it laid down in *Black*, wherein it was stated (17 L. Ed. 2d, at page 29):

> "This Court has never been disposed to vacate convictions without adequate justification, but, under the circumstances presented by the Solicitor General in this case we believe that a new trial must be held. This will give the parties an opportunity to present the relevant evidence and permit the trial judge to decide the questions involved. It will also permit the removal of any doubt as to Black receiving a fair trial with full consideration being given to the new evidence reported to us by the Solicitor General."

and the Order concerning Petitioner Burris be as it was in *O'Brien*, following *Black* (18 L. Ed. 2d, at page 96):

> "PER CURIAM.
>
> The petition for a writ of certiorari is granted, judgment vacated and the cause is remanded to the United States District Court for the Eastern District of Michigan for a new trial should the Government seek to prosecute petitioner anew."

Respectfully submitted,

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